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JUN 0 2 2000

No. 99-1802

IN THE

Supreme Court of the United States

HOWARD ALTSCHULER,

Petitioner,

v.

UNIVERSITY OF PENNSYLVANIA SCHOOL OF LAW, *et al.*, BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN, HAMMER & GLADSTONE, P.C., JANE DOES, in their capacities as employees and/or agents of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C., and individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BRACH, EICHLER, *et al.*

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QUESTION PRESENTED

Whether the District Judge properly excluded the proffered expert testimony by petitioner's expert in the science of law firm hiring practices, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent, Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C., is a professional corporation engaged in the practice of law.

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STATEMENT OF THE CASE

After graduating from law school in May, 1993, the petitioner sent a resume to the law firm of Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. Thereafter, the petitioner was not offered a position with the firm.

The petitioner claims that one of the partners of the firm, Burton Eichler, defamed the petitioner by telling another partner, William Brach, that the petitioner was involved in a disciplinary incident at law school. The petitioner claimed that Mr. Eichler received this information from a faculty member or professor at the University of Pennsylvania.

Mr. Eichler denied ever speaking with anyone at the University of Pennsylvania and every professor and administrator at the University of Pennsylvania who was questioned also denied ever speaking to the Brach, Eichler law firm about the petitioner. Mr. Eichler testified that the information that he obtained about the petitioner came not from the University of Pennsylvania, but from a law school classmate of the petitioner who was an associate with a Connecticut law firm.

William Brach testified at trial that he was not told by his partner, Mr. Eichler, that the petitioner was involved in a disciplinary incident while in law school. Mr. Brach was told that Mr. Eichler had a conversation with an associate with a law firm in Connecticut who advised Mr. Eichler that the petitioner was involved in a "controversy" while in law school. Mr. Brach viewed the receipt of this information from Mr. Eichler as part of the natural exchange of information by partners in a law firm.

The information that Mr. Eichler provided about the "controversy" did not affect the decision whether to hire the petitioner because Brach, Eichler never hired anyone for the position. The position in the Land Use Department for which the petitioner interviewed was never filled by the Brach, Eichler law firm. The firm ultimately made a decision not to replace the departed attorney. Indeed, to the time of trial, the position had never been filled. The undisputed trial testimony demonstrated that the law firm's Executive Committee denied approval for the Land Use Department to hire another attorney based on an analysis of the economic profitability of the department.

The petitioner contends that it was actionable for Mr. Eichler to repeat the negative information he received about the petitioner to his partners without conducting an investigation to verify the information. The petitioner relied on the report of a purported expert in 'law firm hiring practices' to support this claim. The trial judge did not permit plaintiff to present expert testimony on the 'science' of law firm hiring practices.

The petitioner complains that the district court barred the expert testimony during the final pretrial conference held on February 19, 1999, only three days prior to trial. Petitioner conveniently fails to point out that the expert report is dated February 16, 1999, *i.e.*, only six days prior to the scheduled trial date. The Trial Court could not have provided the petitioner with more timely notice of the decision to exclude the expert testimony, because the petitioner failed to timely provide the proffered expert report.

It is on this factual record that the District Court determined that the petitioner failed to provide clear and convincing proof of abuse of the conditional privilege.

SUMMARY OF ARGUMENT

The District Judge appropriately exercised his "gatekeeper" function to screen proposed expert testimony for both reliability and relevance, and properly excluded the testimony of petitioner's expert on hiring practices.

REASONS FOR DENYING THE WRIT

A. The District Judge Did Not Abuse His Discretion in Excluding Petitioner's Expert Report Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Petitioner concedes that the alleged defamatory statements made by Burton Eichler where conditionally privileged. The petitioner had a burden to prove by clear and convincing evidence that there was an abuse of the conditional privilege because the statement was made with actual malice and/or there was excessive publication. The District Judge correctly concluded that there was no evidence, and certainly no clear and convincing evidence, upon which a rational fact finder could conclude that there was actual malice or excessive publication.

The District Judge held that New Jersey law applied to the defamation claim against Brach, Eichler. New Jersey law recognizes that a defamatory statement is not actionable where the statement is subject to a conditional privilege as defined by the New Jersey Supreme Court in *Coleman v. Newark Morning Ledger, Co.*, 29 N.J. 357, 375 (1959):

> . . . [a] communication "made *bonafide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a

> duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable."

Coleman v. Newark Morning Ledger, Co., *quoting*, *Lawless v. Muller*, 99 N.J.L. 9 (Sup. Ct. 1923). The key to the existence of the conditional privilege is the circumstantial justification to the publication of the allegedly defamatory information. *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 36 (App. Div. 1987). In *Bainhauer*, *supra*, the Court cited with approval the *Restatement, Torts Second*, recognizing a conditional privilege where the publisher is, respectively, protecting his own interests, the interests of the recipient or other third person, or an interest common to the publisher and the recipient. *See* 215 N.J. Super. at 36. The "common interest" conditional privilege is defined:

> An occasion makes a publication conditionally privileged if the circumstances leave one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

Restatement, Torts Second, § 596.

As an example of the common interest conditional privilege, the comments to the *Restatement* set forth that a partner is entitled to be told not only of the discharge of an employee by his fellow partner, but also of the reasons for his discharge, and the fellow partner is conditionally privileged to state the reason even though it reflects upon the conduct or character of the employee in question. This is

true even when the employment is at will, and therefore, the partner to whom the information is communicated is not at risk of liability for breach of an employment contract. *Restatement, Torts Second*, § 596, Comment c. Moreover, the *Restatement* recognizes that a personnel manager is privileged to make a defamatory statement about a former employee to a prospective employer as long as the statement directly relates to the employee's qualifications for the job. *Restatement, Torts Second*, § 595, Comment i.

The immunity of the conditional privilege may be lost if the privilege is "abused." The threshold issue of whether a defamatory statement is conditionally privileged is a question of law to be determined by the Court. *Bainhauer v. Manoukian*, 215 N.J. Super. at 40.

There are four circumstances under which the conditional privilege may be abused:

1. If the statements are made with either actual knowledge of falsity or reckless disregard of falsity;

2. The statement is not made for the purpose of protecting the interest which the privilege is designed to protect;

3. Excessive publication of the statement; and

4. The speaker does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given.

Bainhauer v. Manoukian, 215 N.J. Super. at 42-43. The petitioner was required to prove by clear and convincing

evidence, and not a mere preponderance of the evidence, that the Defendant abused the conditional privilege. *Erickson v. Marsh & McLennan*, 117 N.J. 539, 565-566 (1990).

Clear and convincing evidence is that which produces "a firm belief or conviction as to the truth of the allegations sought to be established." *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162 (App. Div. 1990). To meet the clear and convincing standard, the evidence must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Id. quoting*, *Tapler v. Frey*, 184 Pa. Super. 239, 132 A.2d 890, 893 (Super. Ct. 1957).

Reckless disregard as to the truth or falsity of a statement exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of a statement. *Sisler v. Gannett, Co.*, 222 N.J. Super. 153, 162 (App. Div. 1987), *certif. den.*, 110 N.J. 304 (1988). Excessive publication occurs when the Defendant could have no reasonable belief that the publication was an appropriate means of communicating the defamatory matter to another to whom the publication is privileged. *Feggans v. Billington*, 291 N.J. Super. 382, 399 (App. Div. 1996).

Petitioner impliedly concedes that there was absolutely no evidential basis in the trial record from which a rational fact finder could conclude that Burton Eichler had a motive to make statements concerning the petitioner which Mr. Eichler either knew to be false, or recklessly disregarded the truth. There was no evidence at trial to substantiate any motivation on the part of Mr. Eichler to deliberately or recklessly repeat disparaging comments about the petitioner.

Nor was the publication of the information to the two partners of the Land Use Department who considered hiring the petitioner for that department excessive publication. The District Judge correctly concluded petitioner did not provide clear and convincing evidence of abuse of the conditional privilege.

Given the above, the District Judge did not abuse his discretion in excluding petitioner's expert report pursuant to *Daubert*. As noted above, petitioner complains that three days prior to trial that the Trial Court precluded the petitioner's expert from testifying at trial. The petitioner fails to advise this Court that the expert report is dated February 16, 1999, *i.e.*, only six days prior to the scheduled trial date. The Trial Court could not have provided the petitioner with more timely notice of the decision to exclude the expert testimony, because the petitioner failed to timely provide the proffered expert report.

Nor did the District Judge err in his reliance on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, as authority for exclusion of the proffered expert testimony. While the particular expert testimony challenged in *Daubert* did involve scientific knowledge, the Supreme Court has made clear that the principles of *Daubert* are not limited to scientific expert testimony, but instead apply to any expert testimony based upon "technical" or "other specialized knowledge." *Fed. Rule Evid.* 702; *Kuhmo Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Pursuant to *Daubert*, *supra*, trial judges are obligated to screen proposed expert testimony to ensure that it is not only relevant but also reliable. Proposed expert testimony must be supported by appropriate validation, *i.e.*, "good grounds"

based on what is known. Thus the Trial Judge is required to determine that the proposed expert testimony possesses evidentiary reliability. *Daubert* at 590. The District Courts enjoy broad latitude in determining the evidentiary reliability of proposed expert testimony; the District Court's determination of reliability is reviewable on appeal under the abuse of discretion standard. *Kuhmo Tire Company, Ltd.*, *supra*, 119 S. Ct. at 1171.

In this case, the District Court appropriately exercised its discretion in determining that the proposed expert testimony of petitioner's expert lacked the reliability required for admission. Petitioner's expert characterized the hiring process utilized by the Brach, Eichler law firm as "grossly negligent" and "inappropriate and reckless." However, the cause of action for which petitioner sought damages from the Brach, Eichler firm was defamation. The petitioner's expert's proffered testimony was not probative of the central issue, *i.e.*, whether there was an abuse of the conditional privilege by either actual malice or excessive publication; the proffered testimony attempted to create a cause of action for 'law firm hiring practices malpractice.' Moreover, beyond plaintiff's expert's personal opinion and experience, which did not ever include employment by a law firm, there was nothing in the expert report to substantiate the existence of "good grounds" or validation for his opinions, necessary to determine that expert testimony is reliable.

In summary, petitioner's expert's proposed testimony lacked both the reliability and relevance required for the District Judge to conclude that the expert testimony was admissible. The District Judge properly exercised his function in screening the proposed testimony and determining that it was inadmissible.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court deny the writ.

Respectfully submitted,

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